

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.
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VOL. 80

FEBRUARY, 1932

No. 4

THE SUPREME COURT AND STATE ACTION CHALLENGED UNDER THE FOURTEENTH AMENDMENT, 1930-1931.

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The far-reaching social consequences arising from the interplay of powerful economic forces and the judicial function of interpreting the phrase "due process of law" has been a deservedly popular theme for commentators on American constitutional history and law. The supposed need for more efficient judicial protection against burdensome, and frequently ill-advised, restrictions imposed by state lawmakers in their efforts to control public utilities and curb the growing power of corporate wealth was found, after considerable hesitation, in the cabalistic words of the Fourteenth Amendment which were specifically made applicable to state action.¹

The significance of the discovery by the Supreme Court of the United States that the due process clause could be utilized as a constitutional restraint upon the substance of legislation² as well as upon forms and modes of procedure, and for the protection of the property of corporations as well

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¹ See 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) c. XCI; Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, 460; *The Supreme Court and the Fourteenth Amendment* (1909) 7 MICH. L. REV. 643. It was in *Davidson v. New Orleans*, 96 U. S. 97 (1877) that the Supreme Court indulged in *dicta* to the effect that substantive rights of life, liberty and property are protected against legislative deprivation by the due process clause.

² *Davidson v. New Orleans*, *supra* note 1; *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334 (1886); *Chicago, Milwaukee & St. Paul R. R. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462 (1890); *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581 (1897).

as of natural persons,³ was never greater than today, when the opinions of the Court reveal a steady absorption of its time with problems arising out of attempted governmental control over economic enterprise, industrial organization and personal freedom. The tremendous importance of the Supreme Court as the arbiter of the relations between the individual and the government and between the states and the nation has been forcibly and frequently commented upon by many able students of our constitutional law and need not be dwelt upon here.⁴ "Whatever the theory," says Professor Thomas

³ Santa Clara Co. v. Southern Pacific R. R., 118 U. S. 394, 6 Sup. Ct. 1132 (1886); Covington & Lexington Turnpike Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198 (1896); Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418 (1898); Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U. S. 544, 43 Sup. Ct. 636 (1923).

⁴ See, for example, for various aspects of the subject, McGEHEE, *DUE PROCESS OF LAW* (1906); TAYLOR, *DUE PROCESS OF LAW* (1917); MOTT, *DUE PROCESS OF LAW* (1926); HALL, *CONSTITUTIONAL LAW* (1910); 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) c. xci-cv; BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* (1922) c. xxvii-xxxiii; COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* (1912); GUTHRIE, *LECTURES ON THE FOURTEENTH AMENDMENT* (1898); 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) c. xxxv-xxxviii; WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT (1925); FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927); COXE, *JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION* (1893); MEIGS, *RELATION OF THE JUDICIARY TO THE CONSTITUTION* (1919); CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* (1914); HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (1914); GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* (1911); MCBAIN, *THE LIVING CONSTITUTION* (1927); MOORE, *THE SUPREME COURT AND UNCONSTITUTIONAL LEGISLATION* (1913); THOMPSON, *FEDERAL CENTRALIZATION* (1923); McLAUGHLIN, *THE COURTS, THE CONSTITUTION AND PARTIES* (1912); Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454; CORWIN, *The Supreme Court and the Fourteenth Amendment* (1909) 7 MICH. L. REV. 643; Frankfurter, *Hours of Labor and Realism in Constitutional Law* (1916) 29 HARV. L. REV. 353; Kales, *New Methods in Due Process Cases* (1918) 12 AM. POL. SCI. REV. 241; Warren, *The New Liberty under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431; Hough, *Due Process of Law—Today* (1919) 32 HARV. L. REV. 218; Cushman, *Social and Economic Interpretation of the Fourteenth Amendment* (1922) 20 MICH. L. REV. 737; Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943; Spahr, *Natural Law, Due Process, and Economic Pressure* (1930) 24 AM. POL. SCI. REV. 332; Willis, *Due Process of Law under the United States Constitution* (1926) 74 U. OF PA. L. REV. 331; Cantor, *Law and the Social Sciences* (1930) 16 A. B. A. J. 385; Lewis, *Adaptation of the Law to Changing Economic Conditions* (1925) 11 A. B. A. J. 11; Brown, *Police Power—Legislation for Health and Personal Safety* (1929) 42 HARV. L. REV. 866; Waite, *Judicial Statesmen* (1922) 8 A. B. A. J. 375; Colvin, *Liberty and Police Power; or Rules for the Legal Life* (1927) 13 A. B. A. J. 11; Dodd, *Social Legislation and the Courts* (1913) 28 POL. SCI. Q. 1; Swayze, *Judicial Construction of the Fourteenth Amendment* (1912) 26 HARV. L. REV. 1; Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court* (1913) 13 COL. L. REV. 37; Greeley, *The Changing Attitude of the Courts Toward Social Legislation* (1910) 5 ILL. L. REV. 222; Dobyns, *Justice Holmes and the Fourteenth Amendment* (1918) 13 ILL. L. REV. 71; Frankfurter, *The Constitutional Opinions of Justice Holmes* (1916) 29 HARV. L. REV. 683; *Twenty Years of Mr. Justice Holmes' Constitutional Opinions* (1923) 36 HARV. L. REV. 909; *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121; Cushman, *Constitutional Decisions by a Bare Majority of the Court* (1921) 19 MICH. L. REV. 771; Freund, *Constitutional Limitations and Labor Legislation* (1910) 4 ILL. L. REV. 609; Wickersham, *The Police Power, A Product of the Rule of Reason* (1914) 27 HARV. L. REV. 297; Hand, *Due Process of Law and the Eight Hour Day* (1908) 21 HARV. L. REV. 495; Powell, *The Supreme Court's Adjudication of Constitutional Issues in 1921-1922* (1922-23) 21 MICH. L. REV. 63, 174, 290, 437, 542; *Judicial Review of Administrative Action in Immigration Proceedings* (1909) 22 HARV. L. REV. 360; *Administrative Exercise of the Police Power* (1911) 24 HARV. L. REV. 268, 333, 441; *The Constitutional Issue in Minimum Wage Legislation* (1917) 2 MINN. L. REV. 1; *The Workmen's Compensation Cases* (1917) 32 POL. SCI. Q. 542; *The Oregon Minimum Wage Cases* (1917) 32 POL. SCI. Q. 296. For a recent popular but brilliant analysis of the subject see Frankfurter, *The Supreme Court and the Public* (1930) 83 FORUM MAGAZINE 329.

Reed Powell in words of realistic summary, "the fact is that the Supreme Court of the United States can pass on the reasonableness of the police measures of every state and city in the land."⁵

The decisions rendered by the Supreme Court during the October term, 1930, in cases where the constitutionality of state action was challenged on the ground that it violated the due process of law or the equal protection of the laws guaranties of the Fourteenth Amendment furnish interesting material for a study of the operation of the judicial process. The decisions are of interest not only because of the intrinsic importance of the issues presented in some of the cases, but because they may be said to embody, in a very real sense, the social and economic outlook of a recently reconstituted bench.⁶ The analyst of these opinions who is bold enough to venture into the domain of prophecy certainly has no inconsiderable basis for the prediction that the presence on the bench of Mr. Chief Justice Hughes and of Mr. Justice Roberts will exert in the immediate future a profound influence upon the course of legal statesmanship.

The cases decided during this somewhat limited period of time in which the task was imposed upon the Court of construing either one or both of the above-mentioned clauses of the Fourteenth Amendment may be divided roughly into two groups: (1) those passing upon the constitutionality of state taxation laws, and (2) those determining the validity of state action of either a legislative or administrative character in aid of the exercise of its police power and designed to promote some phase of the public welfare, or to remedy some particular evil.⁷ The latter classification, while exceedingly comprehensive and indefinite, will serve well enough for purposes of this discussion.

State Taxation Laws

Throughout the consideration of the cases presented in this section it should be borne in mind that state tax laws are often challenged in the Supreme Court on grounds other than the deprivation of property without due process of law or the denial of the equal protection of the laws. Not infrequently such legislation is attacked on the theory that it is contrary to some specific act of Congress, or because it imposes burdens upon the federal government or its instrumentalities, or because it constitutes a burden upon interstate commerce. Only those cases in which it has been urged

⁵ *The Supreme Court and State Police Power, 1922-1930* (1931) 17 VA. L. REV. 529. For other installments of Professor Powell's scholarly and comprehensive study see *ibid.* 653, 18 *ibid.* 1.

⁶ Mr. Chief Justice Hughes was sworn into office on February 24, 1930; Mr. Justice Roberts was not sworn in until June 2, 1930, and was therefore unable to participate in the work of the Court during the 1929 term.

⁷ Only those cases in which the Court delivered opinions are here considered.

that state action was invalid under the due process or the equal protection clauses of the Fourteenth Amendment are considered here.⁸

State legislative regulation of chain stores has generally taken the form of an occupation tax on the business of retail selling, measured by the gross volume of sales of all stores operated by a single owner, or a license tax computed upon the basis of the number of stores operated by a single owner.⁹ The constitutionality of legislation imposing graduated license fees upon chain store operators in Indiana was passed upon in *State Board of Tax Commissioners of Indiana v. Jackson*.¹⁰ The statute challenged in this case made the operation of any store without a license, to be renewed annually, a misdemeanor.¹¹ The license fees, under section 5 of the Act, were graduated as follows:

"(1) Upon one store, the annual license fee shall be three dollars for each such store; (2) Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store; (3) Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store; (4) Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store; (5) Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store."

The United States district court for the southern district of Indiana had entered a decree perpetually enjoining the enforcement of the law on the ground that it was offensive to both the federal and state constitutions.¹² The appellee, who was a wholesale and retail grocer and meat dealer operating two hundred and twenty-five chain stores in the city of Indianapolis, with a capital investment of more than \$200,000 and annual sales of more than \$1,000,000, had contested the validity of that portion of the Act set forth above on the ground that it was an unreasonable and arbitrary classification for purposes of taxation and a denial of the equal protection of the laws. The Court, however, by a five to four division of its members, declined to accept such a view.

In an opinion which carefully reviewed previous pertinent decisions of the Court, Mr. Justice Roberts emphasized that it was not the Court's function to consider the propriety or justness of the tax, or to seek for the motives, or to criticize the public policy that prompted the enactment of the

⁸ For a review of all taxation cases decided by the Court during the 1929 term, see HANKIN, PROGRESS OF THE LAW IN THE U. S. SUPREME COURT, 1929-1930 (1930) c. vii-viii.

⁹ See Note (1931) 80 U. OF PA. L. REV. 289; Note (1931) 40 YALE L. J. 431; Note (1931) 31 COL. L. REV. 145; Note (1931) 17 IOWA L. REV. 72.

¹⁰ 283 U. S. 527, 51 Sup. Ct. 540 (1931), noted in (1931) 31 COL. L. REV. 1040, (1931) 17 IOWA L. REV. 72, (1931) 18 VA. L. REV. 72, (1931) 20 GEO. L. REV. 87. See also (1931) 31 COL. L. REV. 145, (1931) 15 MINN. L. REV. 341, (1931) 44 HARV. L. REV. 1295.

¹¹ Ind. Laws 1929, c. 207.

¹² 38 Fed. (2d) 652 (S. D. Ind. 1930).

legislation, but to sustain the classification adopted by the legislature if there were substantial differences between the occupations separately classified. He said:

"In view of the numerous distinctions above pointed out between the business of a chain store and other types of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like the appellee, have found advantages in this method of merchandising and have therefore adopted it. . . .

"The court below fell into the error of assuming that the distinction between the appellee's business and that of the other sorts of stores mentioned was solely one of ownership. It disregarded the differences shown by the record. They consist not merely in ownership, but in organization, management, and type of business transacted. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said, this is all that the Constitution requires." ¹³

The minority judges contended that the advantages attributed to the chain store lie not in the fact that it is one of a number of stores under the same management, supervision or ownership, but in the fact that it is one of the parts of a large business. Said Mr. Justice Sutherland (in a dissenting opinion concurred in by Justices Van Devanter, McReynolds and Butler):

". . . the advantages relied upon arise from the aggregate size of the entire business, and not from the number of parts into which it is divided. For the want of a valid ground upon which to stand, therefore, the classification should fall, because it is made to depend, not upon size or value or character, amount of capital invested or income received, but upon the mere circumstance—wholly irrelevant so far as any of the advantages claimed are concerned—that the business of one is carried on under many roofs, and that of the other under one only. Reduced to this single detail of difference, what fairly conceivable reason is there in the policies or objects of taxation which gives countenance to the requirement that the former shall make an annual contribution to the revenues of the state eighteen hundred times as much as the latter? A classification comparable in principle would be to make the amount of an income tax depend upon the number of sources from which the income is derived, without regard to the character of the sources or the amount of the income itself.

"Since the supposed differences thus are reduced to the one of number only, and since that turns out to be irrelevant and wholly without substance, it follows that the act is a 'clear and hostile discrimination' against a selected body of taxpayers, . . . a mere subter-

¹³ *Supra* note 10, at 541-42, 51 Sup. Ct. at 544-45.

fuge by which the members of one group of taxpayers are unequally burdened for the benefit of the members of other groups similarly circumstanced.”¹⁴

The dissenting judges placed specific reliance upon *Quaker City Cab Co. v. Pennsylvania*,¹⁵ in which was held invalid a Pennsylvania statute which imposed a tax upon the gross receipts of corporations engaged in the general taxicab business, but not upon like receipts of individuals and partnerships engaged in the same business.

“The differences relied upon as justifying the tax [Mr. Justice Sutherland declared] are fairly comparable with those relied upon in the present case. It was said that there were advantages peculiar to the corporate organization not enjoyed by individuals or partnerships, such as those pointed out in *Flint v. Stone Tracy Co.* . . .

“These advantages, although brought sharply to the attention of the court, were not considered as constituting differences having a reasonable relation to the object of the Taxing Act, and the tax was held unconstitutional as denying to the corporation the equal protection of the laws. It is hard to see how that conclusion can be reconciled, in principle, with the present decision.”¹⁶

Mr. Justice Roberts did not undertake to reconcile the decision in the instant case with that in the *Quaker City Cab Co.* case. He did not even refer to that decision. The plain fact of the matter is, of course, that the legislation held constitutional in the instant case would in all probability never have been validated had the Court been constituted as it was in 1928, when the *Quaker City Cab Co.* case was decided. The decision of the Court in that case was written by Mr. Justice Butler, who joined the ranks of the dissenting justices in the instant case. Justices Brandeis, Holmes and Stone, who wrote dissenting opinions in 1928, joined Mr. Chief Justice Hughes and Mr. Justice Roberts in forming a majority of the Court in 1931. The problems presented for solution in the two cases were certainly analogous. The dissenting opinions in the former case were based upon virtually the same reasoning as that made use of in the majority opinion in the instant case. It is patent that, in dealing with the question of the constitutionality of an important type of state legislation, there has been a change in policy on the part of the Court due to a change in its personnel.

The equal protection clause of the Fourteenth Amendment, it need hardly be said, lays down no rule of thumb by which the validity of a particular statute may be determined. It is true that in interpreting the clause the Supreme Court has declared in numerous cases that it does not prevent

¹⁴ *Supra* note 10, at 548, 51 Sup. Ct. at 547.

¹⁵ 277 U. S. 389, 48 Sup. Ct. 553 (1928). It is of interest that Mr. Justice Roberts had argued the case for the cab company in the Supreme Court.

¹⁶ *Supra* note 10, at 549-50, 51 Sup. Ct. at 547-48.

a state legislature from distinguishing, selecting and classifying the objects of legislation, or from arranging persons, classes, property, trades or professions in different categories, with reference to the imposition of burdens or taxes upon them or the regulation of their business,¹⁷ provided the laws bear equally and alike upon all those within the same class,¹⁸ and that the system of classification is not arbitrary or capricious, but rests upon some reasonable or substantial ground of distinction, growing out of public policy or prevalent economic or social conditions or the diverse natures of the trades or businesses affected, and having some real relation to the object sought to be accomplished.¹⁹

But what circumstances will justify the Court in concluding that a given classification is either "reasonable" or "arbitrary"? Indubitably there is no magic formula to be applied in the solution of the problems which will guarantee the perfection of the answers. The results reached in particular cases are at bottom the products of judicial discretion. Because of the nature of the subject-matter ordinarily involved, the social, political and economic predilections of the individual judges profoundly influence these results. In the great majority of cases in which state action is contested under the equal protection clause, moreover, there is involved, to borrow the words of Mr. Justice Holmes, merely "the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain."²⁰

In the instant Indiana case the majority judges did not experience any difficulty in finding precedents to fortify their view of the legislation in question. Brief reference to some of these should not be without interest. In *American Sugar Refining Co. v. Louisiana*²¹ a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted planters and farmers grinding and refining their

¹⁷ *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 43 Sup. Ct. 83 (1922); *City and County of Denver v. New York Trust Co.*, 229 U. S. 123, 33 Sup. Ct. 657 (1913); *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. 594 (1898); *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533 (1890); *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496 (1910); *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 30 Sup. Ct. 578 (1910).

¹⁸ *Missouri Pacific R. R. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161 (1888).

¹⁹ *Radice v. New York*, 264 U. S. 292, 44 Sup. Ct. 325 (1924); *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. 594 (1898); *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43 (1900); *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370 (1916); *Quong Wing v. Kirkendall*, 223 U. S. 59, 32 Sup. Ct. 192 (1912); *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 30 Sup. Ct. 578 (1910). In the case last cited it was said at 573, 30 Sup. Ct. at 580: "A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

²⁰ *Klein v. Board of Tax Supervisors of Jefferson County, Kentucky*, 282 U. S. 19, 23, 51 Sup. Ct. 15 (1930).

²¹ *Supra* note 19.

own sugar and molasses, was held not to constitute an unconstitutional discrimination. In *Quong Wing v. Kirkendall*²² a statute of Montana imposing a license fee on hand laundries was held not to be a denial of the equal protection of the laws because it did not apply to steam laundries, and because it exempted from its operation laundries not employing more than two women. In *Metropolis Theatre Co. v. Chicago*²³ an ordinance classified theatres for license fees based on and graded according to the admission charged. It was shown that some of the theatres charging a higher admission had less revenue than those charging smaller price and therefore paying lower license fees. The classification was held valid. In *W. W. Cargill Co. v. Minnesota*²⁴ a state statute requiring the proprietors of warehouses situated on the right of way of a railroad to secure a license from a state commission, and containing no such requirement with respect to warehouses not so situated but doing precisely the same business, was held constitutional. In *Armour Packing Co. v. Lacy*²⁵ a North Carolina statute imposed an occupation tax upon every meat packing house doing business in that state. The appellant company had its packing house in Kansas City and shipped its products to various depots in the state, where they were sold in competition with wholesalers and commission merchants who were not required, as was the Armour Company, to pay the tax. The statute was sustained. In *Bradley v. Richmond*²⁶ an ordinance imposed a tax on the conduct of certain businesses and gave a power of classification to a committee of the city council. That committee classified private bankers, placing a tax of one amount on certain of them and of a different amount on others. The business of those in the one class was that of lending money at high rates upon salaries and household furniture, while that done by the other class was that of lending money upon commercial securities. The classification was held not to be a denial of the equal protection of the laws.

The decision in the instant case is a welcome one to those who endorse Mr. Justice Holmes' well-known judicial approach to cases coming before the Court in which governmental action is challenged under the Fifth or Fourteenth Amendments.²⁷ Viewed from the standpoint of social policy, there seems to be no valid reason why state lawmakers should not be given wide latitude in experimenting with taxation devices designed to curb the

²² *Supra* note 19.

²³ 228 U. S. 61, 33 Sup. Ct. 441 (1913).

²⁴ 180 U. S. 452, 21 Sup. Ct. 423 (1901).

²⁵ 200 U. S. 226, 26 Sup. Ct. 232 (1906).

²⁶ 227 U. S. 477, 33 Sup. Ct. 318 (1913).

²⁷ See THE DISSIDENT OPINIONS OF MR. JUSTICE HOLMES (1930); FRANK, LAW AND THE MODERN MIND (1930) 253 *et seq.*; Dobyns, *Justice Holmes and the Fourteenth Amendment* (1918) 13 LL. L. REV. 71; Frankfurter, *The Constitutional Opinions of Justice Holmes* (1916) 29 HARV. L. REV. 683; *Twenty Years of Mr. Justice Holmes' Constitutional Opinions* (1923) 36 HARV. L. REV. 909; *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121.

growth of chain stores. If, in an effort to favor the small storekeeper and the local banker, they see fit to subject this form of business enterprise to a discriminatory taxing policy, it seems little short of grotesque for nine (or to speak more literally, five) men in the national capital to undertake to nullify their action by judicial fiat, no matter how vicious or absurd such action may be considered to be. Certainly the chain store with its centralized management, large capital resources, advertising advantages, quantity buying, and superior facilities for mass distribution, may very well be considered a sufficiently distinct form of economic organization to justify special governmental regulation.²⁸ If legislation of this type is economically unsound, its un wisdom will in time be demonstrated. Remedial measures can then be adopted and a policy put into effect that will meet the tested needs of experience.

During the 1929-30 term of the Court the question of the constitutionality of state inheritance tax legislation had assumed unusual importance, due in part to the fact that the Supreme Court reversed one of its own previous decisions and greatly expanded the scope of the due process clause. Prior to this time it had been the general position of the Court that incidental hardship resulting from the operation of state taxation laws did not in itself render such legislation invalid, and that there was nothing in the Federal Constitution to afford protection against double taxation by a state.²⁹

It was in *Farmers Loan and Trust Co. v. Minnesota*³⁰ that the Court reversed itself. In that case a resident of New York died, owning bonds of the state of Minnesota, of the cities of St. Paul and Minneapolis, and certain state certificates of indebtedness, all worth more than \$300,000.

²⁸ See, for example, ZIMMERMAN, *THE CHALLENGE OF CHAIN STORE DISTRIBUTION* (1931); NYSTROM, *ECONOMICS OF RETAILING* (1930) 224-37; BAXTER, *CHAIN STORE DISTRIBUTION AND MANAGEMENT* (1928); HAYWARD AND WHITE, *CHAIN STORES* (1928); Taylor, *Prices in Chains and Independent Grocery Stores in Durham, N. C.* (1930) 8 HARV. BUS. REV. 413; Becker and Hess, *The Chain Store License Tax and the Fourteenth Amendment* (1928) 7 N. C. L. REV. 115. See also for valuable discussions the four notes cited *supra* note 9.

²⁹ In *Coe v. Errol*, 116 U. S. 517, 524, 6 Sup. Ct. 475, 477 (1886) the Court said: "If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary." In *Baker v. Druesedow*, 263 U. S. 137, 140, 44 Sup. Ct. 40, 41 (1923), Mr. Justice Brandeis, in holding that the due process clause did not preclude a state from taxing the intangible property of a railroad, or from ascertaining its value by deducting the value of the tangible property from that of the entire property of the road, after giving the railroad company an opportunity to be heard and submit evidence as to the value, said: "The contention that the statute violates the Fourteenth Amendment is wholly without merit. It has long been settled that the due process clause does not preclude a State from taxing the intangible property of a railroad, or from ascertaining its value substantially in the manner prescribed by the statute herein assailed; that the equal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business; and that the Federal Constitution does not afford protection against double taxation by a State, which is here alleged."

³⁰ 280 U. S. 204, 50 Sup. Ct. 98 (1930), noted in (1930) 29 MICH. L. REV. 93; (1930) 40 YALE L. J. 99. For a discussion of the problem involved see also (1930) 30 COL. L. REV. 404, 1071, and (1930) 3 SO. CALIF. L. REV. 428.

The bonds had been kept within the state of New York. None had any connection with business carried on by or for the decedent in Minnesota. That state, however, assessed an inheritance tax upon the transfer of these bonds. The state supreme court approved this action and upheld the tax,³¹ and the executor appealed to the Supreme Court of the United States on the ground that Minnesota had no jurisdiction to tax the transfers at the death of the non-resident and that the inheritance tax law was in contravention of the due process clause of the Fourteenth Amendment. Minnesota contended that since the debts represented by the bonds were given validity and protection by her law, the *situs* for taxation purposes was in that state. This was in substance the rule laid down by the Supreme Court in *Blackstone v. Miller*.³² In other words, up to this time it had been the view of the Court that choses in action were subject to taxation both at the debtor's domicile and at the domicile of the creditor, and that two states might tax on different principles the same testamentary transfer of property.

In the *Farmers Loan and Trust Co.* case, however, the Court held the tax invalid on the ground that the bonds had never come within the territorial jurisdiction of the state of Minnesota, after the non-resident decedent had acquired them. In delivering the opinion of the Court, Mr. Justice McReynolds said:

"A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. . . .

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." ³³

Blackstone v. Miller was thrown into the judicial discard. Mr. Justice McReynolds declared that it "no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled." ³⁴ The Court took the position, in other words, that, due to changed social and economic conditions, the due process clause should be interpreted as guaranteeing protection against double taxation. Mr. Justice Holmes, who had written the decision in *Blackstone v. Miller*, protested (together with Mr. Justice Brandeis) against this change of attitude in a vigorous dissenting opinion. He clung to the earlier position of the Court that the

³¹ *In re Estate of Taylor*, 176 Minn. 634, 222 N. W. 528 (1928).

³² 188 U. S. 189, 23 Sup. Ct. 277 (1903).

³³ *Supra* note 30, at 212, 50 Sup. Ct. at 100.

³⁴ *Supra* note 30, at 209, 50 Sup. Ct. at 99.

bonds should be held taxable by Minnesota in spite of the fact that they were also taxable at the domicile of the owner, because the debt or obligation represented by the bonds existed by virtue of, and under the protection of, the laws of Minnesota. He said:

"It seems to me that the law of Minnesota is a present force necessary to the existence of the obligation, and that therefore, however contrary it may be to enlightened policy, the tax is good. . . .

"A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds." ³⁵

In *Baldwin v. Missouri*,³⁶ decided at the same term of court, a resident of Illinois died, leaving all her property to her son, also a resident of Illinois. At her death she owned certain intangible property in the form of bank accounts, coupon bonds issued by the United States, and sundry promissory notes, most of which were executed by citizens of Missouri. The evidences of all this property were discovered in the state of Missouri. The supreme court of Missouri had held that the state could impose an inheritance tax on this property, since the evidences thereof were found in the state.³⁷ Or to put the matter in another way, it was held that the *situs* of the property, for purposes of taxation, was within the state. The Supreme Court, however, relying on its decision in the *Farmers Loan and Trust Co.* case, held the Missouri taxing law ³⁸ unconstitutional. Said Mr. Justice McReynolds:

"The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. At that point they too passed from the dead to the living and there this transfer was actually taxed. As they were not within Missouri for taxation purposes the transfer was not subject to her power." ³⁹

Mr. Justice Holmes again dissented, contending that since the bonds, notes and bank accounts were within the power and received the protection of Missouri, the tax was justifiable. That state was entitled to demand a *quid pro quo*. He suggested that several other cases ⁴⁰ "now join *Blackstone*

³⁵ *Supra* note 30, at 216-18, 50 Sup. Ct. at 102-3.

³⁶ 281 U. S. 586, 50 Sup. Ct. 436 (1930), noted in (1930) 44 HARV. L. REV. 132; (1930) 79 U. OF PA. L. REV. 99; (1930) 40 YALE L. J. 99; (1930) 29 MICH. L. REV. 93; (1931) 4 SO. CALIF. L. REV. 326. See also Rottschaefer, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV. L. REV. 1075; Lowndes, *Bases of Jurisdiction in State Taxation of Inheritances and Property* (1931) 29 MICH. L. REV. 850; Mason, *Jurisdiction for the Purpose of Imposing Inheritance Taxes* (1931) 29 MICH. L. REV. 324.

³⁷ 323 Mo. 207, 19 S. W. (2d) 732 (1929).

³⁸ MO. REV. STAT. (1919) § 558.

³⁹ *Supra* note 36, at 593, 50 Sup. Ct. at 438.

⁴⁰ *Liverpool & London & Globe Ins. Co. v. Board of Assessors for the Parish of Orleans*, 221 U. S. 346, 31 Sup. Ct. 550 (1911); *Wheeler v. Sohmer*, 233 U. S. 434, 34 Sup. Ct. 607 (1914).

v. Miller on the *Index Expurgatorius*—but we need an authoritative list.” He declared:

“I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. . . . Of course the words ‘due process of law’ if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court’s own discretion, the validity of whatever laws the States may pass.”⁴¹

Mr. Justice Stone, who had concurred in the result reached in the Minnesota case on the ground that there it was not necessary to invoke the power of the state to effect a transfer of the property, now joined Justices Holmes and Brandeis. He pointed out that Missouri laws alone protected the physical notes and bonds and the securities located there. He saw no reason why the state in which the evidences of indebtedness were found should be deprived of taxing power merely because the taxpayer had subjected himself to the same power of another state. He intimated that the Court’s opinion would open the door to fraud and evasion. He said:

“Under the law as it has been, no one need subject himself to double taxation by keeping his securities in a state different from his domicile, or by seeking the protection of its laws for his mortgage investments. But it is a practical consideration of some moment that taxation becomes increasingly difficult if the securities of a non-resident may not be taxed where located, and where alone they may be reached, but where the courts are not open to the tax gatherers of the domicile.”⁴²

We are now in a position to refer to *Beidler v. South Carolina Tax Commission*,⁴³ decided during the 1930 term, in which the Court was called upon to determine the legality of South Carolina’s action in imposing an inheritance tax on indebtedness in the form of advances and dividends due from a South Carolina corporation to a non-resident stockholder. The South Carolina tax commission had levied a tax on the transfer of such indebtedness, over-

⁴¹ *Supra* note 36, at 595, 50 Sup. Ct. at 439.

⁴² *Supra* note 36, at 598, 50 Sup. Ct. at 440.

⁴³ 282 U. S. 1, 51 Sup. Ct. 54 (1930), noted in (1931) 31 COL. L. REV. 174; (1931) 29 MICH. L. REV. 389.

ruling the claim of the executors of the non-resident stockholder's estate that the state had no jurisdiction to impose such a tax, and that its levy constituted a deprivation of property without due process of law. The supreme court of South Carolina sustained the action of the tax commission and the executors appealed to the Supreme Court of the United States. In holding the tax unconstitutional, Mr. Chief Justice Hughes said:

"In reaching its conclusion as to the validity of the tax, the state court relied chiefly upon the decision of this Court in *Blackstone v. Miller*. . . . That decision has been overruled, and it is now established that the mere fact that the debtor is domiciled within the state does not give it jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who is domiciled in another state. . . . Open accounts, including credits for cash deposited in bank, fall within this principle, and its application is not defeated by the mere presence of bonds or notes, or other evidences of debt, within a state other than that of the domicile of the owner." ⁴⁴

In this case Mr. Justice Holmes merely observed that the decisions of the last term cited by the Chief Justice seemed to sustain the conclusions reached by him. "Therefore", he continued, "Mr. Justice Brandeis and I acquiesce, without repeating reasoning that did not prevail with the Court." ⁴⁵

An important decision involving the alleged retroactive application of the Massachusetts inheritance tax law was *Coolidge v. Long*.⁴⁶ The contested legislation, which took effect on January 1, 1921, provided that all property within the jurisdiction of the state which should pass to any person, absolutely or in trust, by deed, grant or gift, except in cases of a *bona fide* purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after death, should be subject to a tax.⁴⁷ The petitioners (appellants in this case) were trustees under a deed and declaration of trust executed on July 29, 1907 by J. Randolph Coolidge, Julia Coolidge and the petitioners. By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a *bona fide* purchase for full consideration in money or in money's worth. The part of the trust fund furnished by Mr. Coolidge was four-sevenths, and that furnished by Mrs. Coolidge was three-sevenths. Mrs. Coolidge died in January, 1921, and Mr. Coolidge on November 10, 1925. By the terms of the trust the income was to be paid

⁴⁴ *Supra* note 43, at 7-8, 51 Sup. Ct. at 55.

⁴⁵ *Supra* note 43, at 10, 51 Sup. Ct. at 55.

⁴⁶ 282 U. S. 582, 51 Sup. Ct. 306 (1931), noted in (1931) 15 MINN. L. REV. 726; (1931) 29 MICH. L. REV. 1095; (1931) 44 HARV. L. REV. 1103; (1931) 40 YALE L. J. 1331. For a discussion of the subject involved see also Rottschaefer, *Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930) 14 MINN. L. REV. 453, 613, 623-25.

⁴⁷ MASS. GEN. LAWS (1921) c. 65.

in the above-mentioned proportions to each of the settlors during their joint lives and then the entire income to the survivor. Upon the death of the survivor, the principal was to be divided equally among five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share.

When the declaration of trust involved in this case was executed, no statute was in effect under which the succession to the trust property could have been subjected to this tax. The statutes then in force provided for the imposition of an excise only where the succession was to collateral relations and strangers. The defendant, commissioner of corporations and taxation of the state, determined that the petitioners were subject to excise taxes, under the law, upon the four-sevenths and the three-sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925. The probate court of Norfolk County, Massachusetts, reserved for the consideration of the supreme judicial court all questions of law and the matter of what decrees should be entered. That court held the statute constitutional and sustained the taxes.⁴⁸ The petitioners appealed to the Supreme Court of the United States, challenging the statute on the ground of its alleged repugnance to the contract clause of the Federal Constitution and to the due process and equal protection clauses of the Fourteenth Amendment thereto.

The Court, in a five to four decision, invalidated the statute. Mr. Justice Butler, in delivering its opinion, stressed the point that no act of Congress had been held by the Court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment. Here the succession was complete when the trust deeds of Mr. and Mrs. Coolidge took effect. Since it had been decided in numerous cases that a transfer tax is imposed not upon property but upon the right of succession, it followed that where there was a complete vesting of the right to possession and enjoyment before the enactment of the transfer tax statute, it could not be reached by that form of taxation. The statute, therefore, was repugnant both to the contract clause and to the due process clause. The following extract from the New York case of *Re Craig*⁴⁹ was quoted with approval:

"The underlying principle which supports the tax is that such right [the right of succession] is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right

⁴⁸ 268 Mass. 443, 167 N. E. 757 (1929).

⁴⁹ 97 App. Div. 289, 89 N. Y. Supp. 971 (1904), *aff'd*, 181 N. Y. 551, 74 N. E. 1116.

it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties.”⁵⁰

Mr. Justice Roberts wrote a dissenting opinion, concurred in by Justices Holmes, Brandeis and Stone. He said in part:

“The application of the statute . . . is held by this Court to be a denial of due process, and an impairment of the obligation of a contract, on the sole ground that the remainder vested before the adoption of the taxing statute, although the enjoyment in possession of the property, and the termination of the possibility of the contingent gift over, both followed its enactment.

“This is to deny to the commonwealth the power to distinguish, in laying its tax, between the vesting of a defeasible future interest which carries to the beneficiary no assurance of future possession or enjoyment and the later vesting of that interest by death in possession and enjoyment of the tangible property, without possibility of being divested. It is to assert that the succession is so complete upon the mere creation of the future interest that the state must tax the future estate when that interest comes into being, or thereafter abstain entirely from taxing it.

“This position seems to me untenable. It is founded on the premise that the only privilege enjoyed by the holder of a future interest in property is the dry legal abstraction of owning that particular interest—that, if it vested years ago, to tax the owner later on the occasion of his coming into actual possession, control, and enjoyment of the property is in fact to tax him presently for the exercise of a privilege long since enjoyed.”⁵¹

There has been no uniformity in the decisions of state courts where problems were presented similar to that in the instant case. As indicated above, the New York court antedated the Supreme Court in invoking the contract clause. And in *Hunt v. Wicht*⁵² it was said that taxation of this character amounted to a taking of private property for public use without compensation. These state courts and the majority opinion in *Coolidge v. Long* take the view that technically a future interest has vested in the remaindermen by *inter vivos* grant. The dissenting opinion, however, argues that to decide the case on this ground is to give too much weight to a mere technicality. It was hard for Mr. Justice Roberts to understand, moreover, why a tax laid upon the succession after the future interest has been created and the right accrued, but before the actual enjoyment in possession of the

⁵⁰ *Ibid.* 296, 89 N. Y. Supp. at 975.

⁵¹ *Supra* note 46, at 607-8, 51 Sup. Ct. at 313.

⁵² 174 Cal. 205, 162 Pac. 639 (1917). But *cf.* *Farmers' Loan & Trust Co. v. Bugbee*, 6 N. J. Misc. 415, 141 Atl. 579 (1928). The importance of the question involved is shown by the fact that forty-one states and territories have statutes containing provisions substantially similar to those of the Massachusetts acts involved in the instant case. The complete list is furnished in a footnote to the dissenting opinion. *Supra* note 46, at 607, 51 Sup. Ct. at 313.

property, is any more a denial of due process of law than a tax laid upon income accrued prior to the enactment of the taxing law but received after its passage. The validity of the latter form of tax, he pointed out, is now beyond question.

The remaining cases involving the constitutionality of state taxation laws gave the Court little difficulty and may be disposed of without extended comment.

In *Columbus and Greenville Railway Company v. Miller*⁵³ a Mississippi law imposing a levee tax of \$350 a mile on the main line of standard gauge railroads within a levee district, but providing by an amending Act of 1926⁵⁴ that the tax per mile of any railroad company which did not own in excess of twenty-five miles of railroad within the district should be \$50, was held not to be a violation of due process of law or of the equal protection of the laws. The railway company here fell within the classification provided for by the amendment, as its main line in the district was only 18.41 miles in length. It had paid the tax at the rate of \$50 a mile, but the state tax collector sued to collect a tax at the higher rate. The supreme court of the state had held the classification put into effect by the Act of 1926 to be arbitrary and unreasonable, and therefore in violation of the Fourteenth Amendment.⁵⁵ Mr. Chief Justice Hughes pointed out first that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasion of personal or property rights or through some form of discrimination which the Amendment forbids. The constitutional guaranty, he said, did not extend to the mere interest of an official, who had been deprived of no property at all. Answering the contention that the Act of 1926 was invalid upon its face, he said:

"But the mere selection by the state Legislature, in the exercise of its broad discretion in the imposition of taxes, of a mileage basis, and the establishment of a particular class of railroads having less than twenty-five miles of main line within the District, cannot be regarded, in the absence of any further showing, as arbitrary and as constituting a violation of the Federal Constitution. On the contrary, a classification of this sort has frequently been sustained."⁵⁶

In *Memphis and Charleston Railway Company v. Pace*⁵⁷ the Court was asked to hold unconstitutional as a denial of the due process and equal protection clauses, several statutes passed by Mississippi permitting the creation of a road district and the imposition of an *ad valorem* tax on all taxable property, real and personal, within the district.⁵⁸ The appellant

⁵³ 283 U. S. 96, 51 Sup. Ct. 392 (1931).

⁵⁴ Miss. Laws 1926, c. 259.

⁵⁵ 127 So. 784 (Miss. 1930).

⁵⁶ *Supra* note 53, at 101, 51 Sup. Ct. at 394.

⁵⁷ 282 U. S. 241, 51 Sup. Ct. 108 (1931).

⁵⁸ Miss. Laws 1920, c. 277; *ibid.* 1926, c. 278; Miss. Priv. & Loc. Laws 1926, c. 1080.

contended that the tax was objectionable since it was not apportioned according to benefits, that its property in fact received no benefits from the improvement, but that even conceding that it did receive some benefit, the tax laid thereon was disproportionate to the benefit and to the tax laid on other property. The supreme court of the state had sustained the laws.⁵⁹ Citing previous decisions in taxation cases where similar issues were presented, the Supreme Court upheld the levy. Mr. Justice Van Devanter, speaking for a unanimous Court, said:

"Where the tax is laid generally on all property or all real property within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an ad valorem basis; nor where the tax is thus general and ad valorem does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community."⁶⁰

In *Hans Rees' Sons, Inc. v. North Carolina*⁶¹ several statutes of North Carolina⁶² were invalidated which imposed upon a corporation a tax based upon such proportion of its entire income as the value of its realty and tangible personalty within the state bore to the value of its entire realty and tangible personalty, and which was so applied in the instant case as to tax from 66 per cent. to 85 per cent. of the entire income of the corporation, on the ground that, as thus applied, it was so arbitrary and unreasonable as to violate the due process and equal protection clauses of the Fourteenth Amendment. The evidence showed that the appellant corporation, which was engaged in the business of tanning, manufacturing, and selling belting and other heavy leathers, was incorporated in New York and maintained a manufacturing plant in Asheville, North Carolina. The business was conducted upon both wholesale and retail plans. The corporation claimed that the profit from its wholesale business was partly attributable to manufacturing in North Carolina and partly to selling in New York, but that the accountants for the commissioner of revenue made no attempt to separate this, and that the entire wholesale profit was credited to manufacturing and allocated to North Carolina. It was said that no attempt was made to separate profits derived from manufacturing in New York from profits from manufacturing in Asheville, and that all manufacturing profits were allocated to North Carolina. It was also claimed that, in the retail part of the business, certain operations essential to the retail merchandising business were conducted from the New York office. The so-called "buying profit" was alleged to result from the skill with which hides were bought, and it was contended that these buying operations were not conducted in North Carolina. The

⁵⁹ *Memphis & C. R. R. v. Bullen*, 154 Miss. 536, 121 So. 826 (1929).

⁶⁰ *Supra* note 57, at 246, 51 Sup. Ct. at 110.

⁶¹ 283 U. S. 123, 51 Sup. Ct. 385 (1931). See comment in (1931) 40 YALE L. J. 1273.

⁶² N. C. Laws 1923, c. 4, § 201; *ibid.* 1925, c. 101, § 201; *ibid.* 1927, c. 80, § 311.

evidence also tended to show that for the years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within North Carolina was 17 per cent. The appellant's prayer for revision of taxes had been disallowed by the state commissioner of revenue, and the judgment of the superior court dismissing the taxpayer's action had been affirmed by the supreme court of North Carolina.⁶³ Mr. Chief Justice Hughes stated the Court's position as follows:

"For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that state. In this view, the taxes as laid were beyond the state's authority."⁶⁴

In *Klein v. Board of Tax Supervisors of Jefferson County, Kentucky*,⁶⁵ the Supreme Court held valid a Kentucky statute⁶⁶ which provided that the individual shareholders of a corporation, at least 75 per cent. of whose total property was taxable in Kentucky, should not be required to list their shares for taxation so long as the corporation paid taxes on all of its property in Kentucky. Holders of stock in corporations generally were required to list their shares for taxation. To the contention that this discrimination was a denial of the equal protection of the laws, Mr. Justice Holmes replied as follows:

"Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain. . . .

"We agree with the Court of Appeals that there could have been no question if the statute had said ninety per cent and that fixing seventy-five was equally plainly 'a reasonable effort to do justice to all in view of the way all our other assessments are made'.

"... The principle of justice that leads to the exemption that has been dealt with could not be insisted upon as a matter of constitutional right and it is reasonable for the legislature to confine it to well marked cases, rather than to press it to a logical extreme."⁶⁷

⁶³ 199 N. C. 42, 153 S. E. 850 (1930).

⁶⁴ *Supra* note 61, at 135, 51 Sup. Ct. at 389.

⁶⁵ 282 U. S. 19, 51 Sup. Ct. 15 (1930).

⁶⁶ Ky. Acts 1930, § 4088. The court of appeals of Kentucky had affirmed the validity of the legislation. See 230 Ky. 182, 18 S. W. (2d) 1009 (1929).

⁶⁷ *Supra* note 65, at 23-24, 51 Sup. Ct. at 15-16.

In *Storaasli v. Minnesota*⁶⁸ the appellant, a member of the military forces of the United States quartered upon the Fort Snelling reservation, challenged the validity of Minnesota legislation⁶⁹ providing for the imposition of a motor vehicle registration tax upon the ground, *inter alia*, that it discriminated against him in favor of residents, because it exempted vehicles licensed under it from payment of property taxes. The Court, however, declared the exemption to be a lawful one, saying that the appellant was not discriminated against merely because of the fact that he was not in a position to claim the exemption. "Doubtless in the case of every taxing act which creates exemptions", said Mr. Justice Roberts, "there are those who cannot bring themselves within the exempt class, but this does not deprive them of the equal protection of the law."⁷⁰

A tax imposed by the California constitution⁷¹ on the gross receipts of companies owning, operating or managing any automobile, truck or auto-truck, jitney bus, stage or autostage, used in the business of transportation of persons or property, as common carriers for compensation over any public highway within the state, was held valid by a unanimous vote in *Alward v. Johnson*.⁷² It was provided that funds arising from the levy were to be assigned to maintain the roads essential to the operation of the companies. The word "companies" included persons, partnerships, joint stock associations, companies and corporations. Speaking for the Court, Mr. Justice McReynolds said that the petitioner was in no position to complain of an arbitrary enactment. There was a plain distinction between property employed in conducting a business which required constant use of the highways and property not so employed. The mere fact that he was required to pay a higher rate upon property devoted to his peculiar business than was demanded of property not so employed was considered unimportant.

State Action in Aid of the Police Power

Among the forms of state action passed upon by the Court, of either a legislative or administrative character, which are included under this broad and indefinite grouping are measures tending to restrict freedom of speech or of the press, regulate banking, trade and commerce, regulate forms and modes of judicial procedure, conserve wild game and natural resources, promote the public safety, health, morals and welfare, or to remedy some particular evil. In none of the cases here dealt with, however, can the state action complained of be catalogued as pertaining to "morals" or "health".

⁶⁸ 283 U. S. 57, 51 Sup. Ct. 354 (1931).

⁶⁹ MINN. STAT. (Mason, 1927) §§ 2672-2704, as amended by Minn. Laws 1929, c. 335. The supreme court of the state had sustained the legislation, 180 Minn. 241, 230 N. W. 572 (1930).

⁷⁰ *Supra* note 68, at 62, 51 Sup. Ct. at 355.

⁷¹ Art. 13, § 15. The state supreme court had sustained the tax. See 208 Cal. 359, 281 Pac. 389 (1929).

⁷² 282 U. S. 509, 51 Sup. Ct. 273 (1931), noted in (1931) 31 COL. L. REV. 899.

In *Near v. Minnesota*⁷³ the Supreme Court held unconstitutional as a denial of liberty of the press and of speech a statute of Minnesota⁷⁴—the so-called "Gag Law"—which provided for the abatement, as a public nuisance, of "a malicious, scandalous and defamatory newspaper, magazine or other periodical". The statute authorized the suppression of such publications by injunction, unless the publisher could prove that "the truth was published for good motives and for justifiable ends", and made further publication punishable as a contempt. The court was empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by a fine of not more than \$1,000 or by imprisonment in the county jail for not more than twelve months. In announcing the Court's opinion, Mr. Chief Justice Hughes declared that "it is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property".⁷⁵ The statute under consideration, he pointed out, operated not only to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. He continued:

"If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.

⁷³ 283 U. S. 697, 51 Sup. Ct. 625 (1931), noted in (1931) 80 U. OF PA. L. REV. 130.

⁷⁴ MINN. STAT. (Mason, 1927) §§ 10,123-1 to 10,123-3. The supreme court of Minnesota had sustained the validity of the statute. See 179 Minn. 40, 228 N. W. 326 (1929).

⁷⁵ *Supra* note 73, at 707, 51 Sup. Ct. at 628. The following cases were cited by the Chief Justice in support of this statement: *Gitlow v. New York*, 268 U. S. 652, 45 Sup. Ct. 625 (1925); *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927); *Fiske v. Kansas*, 274 U. S. 380, 47 Sup. Ct. 655 (1927); *Stromberg v. California*, 283 U. S. 359, 51 Sup. Ct. 532 (1931). The Supreme Court has been hesitant in arriving at this result. In *Patterson v. Colorado*, 205 U. S. 454, 27 Sup. Ct. 556 (1907), and in *Gilbert v. Minnesota*, 254 U. S. 325, 41 Sup. Ct. 125 (1920), it expressly declined to decide whether the Constitution of the United States imposed any limitation on a State in restricting speech. In *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 543, 42 Sup. Ct. 516, 522 (1922) the Court said by way of *dicta*, that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech.' . . ." In the *Gitlow* case, *supra*, however, the Court said (at 666, 45 Sup. Ct. at 630): "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states. We do not regard the incidental statement in *Prudential*

" . . . If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship." ⁷⁶

Mr. Justice Butler wrote a vigorous dissenting opinion which was concurred in by Justices Van Devanter, McReynolds and Sutherland. In the opinion of these justices the majority opinion gave to the concept of freedom of the press a meaning and scope not theretofore recognized, and construed "liberty" in the due process clause in such a manner as to "put upon the states a federal restriction that is without precedent". In their view it was wholly proper for the state to denounce as nuisances publications that threatened morals, peace and good order, and to enjoin their further publication. They pointed out that the statute did not authorize a *previous* restraint on publication, but only one in respect of continuing to do what had been duly adjudged to constitute a nuisance. Said Mr. Justice Butler :

"It is well known, as found by the state Supreme Court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion." ⁷⁷

In *Stromberg v. California* ⁷⁸ the Supreme Court held unconstitutional (Justices McReynolds and Butler dissenting) as a denial of the right of free speech and an impairment of liberty the first clause of a statute of California ⁷⁹ which made it a felony to display in any public place a red flag, banner or badge "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an

Ins. Co. v. Cheek, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, as determinative of this question." For a discussion of this subject see Note (1931) 31 COL. L. REV. 468.

⁷⁶ *Supra* note 73, at 713, 721, 51 Sup. Ct. at 630, 633.

⁷⁷ *Supra* note 73, at 737-38, 51 Sup. Ct. at 638-39.

⁷⁸ *Supra* note 75, discussed in (1931) 19 GEO. L. REV. 469.

⁷⁹ CAL. PEN. CODE (Deering, 1923) § 403a.

aid to propaganda that is of a seditious character." The appellant, a young woman of nineteen, was one of the supervisors of a summer camp for children. She was a member of the Young Communist League, an international organization affiliated with the Communist Party. The charge against her concerned a daily ceremony at the camp in which she supervised and directed the children in raising a red flag, "a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States." There was also a ritual at which the children stood at salute and recited a pledge of allegiance "to the workers' red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class." The appellant was convicted in a superior court of California and the judgment was affirmed by the district court of appeal.⁸⁰ Petition for a hearing by the supreme court of California had been denied. The state court had conceded that the constitutionality of the phrase "of opposition to organized government", contained in the first clause of the statute, was doubtful, but based its decision on the ground that this phrase could be eliminated from the section without materially changing its purposes. Disregarding the first clause of the statute, and upholding the other clauses, the state court sustained the conviction.

The Supreme Court, speaking through Mr. Chief Justice Hughes, was unable to agree with this disposition of the case. The verdict against the appellant, the Court pointed out, was a general one and did not specify the ground upon which it rested. If any one of the clauses of the statute was invalid, and it could not be determined upon the record that the appellant was not convicted under that clause, the conviction could not be upheld. The Court concluded from its study of the record that it was impossible to say under which clause of the statute the conviction was obtained. In holding unconstitutional the first clause of the Act, Mr. Chief Justice Hughes said:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." ⁸¹

The decisions in these two cases indicate an unmistakable liberal trend upon the part of the Supreme Court in passing upon the constitutionality of legislation designed to curb freedom of speech and of the press. It is

⁸⁰ 106 Cal. App. 725, 290 Pac. 93 (1930).

⁸¹ *Supra* note 75, at 369, 51 Sup. Ct. at 536.

extremely doubtful, to say the least, if the statute under consideration in *Near v. Minnesota* would have been invalidated had the Supreme Court been constituted as it was at the beginning of the 1929 term. In the *Stromberg* case, however, it will be noted that Justices Van Devanter and Sutherland joined the ranks of the majority, so that here it is probable that the statute would have been repudiated even without the aid of the two newest members of the Court. The liberality of the Court's view is indicated by its insistence, in the extract from the *Stromberg* case above quoted, that the privilege of free discussion, to the end that governmental changes may be secured by lawful means, is essential to national security. And in the *Near* case it was even said that adverse criticism of public officials is of great social utility. It was pointed out that "the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities." ⁸²

In the *Stromberg* case, nevertheless, the Court reiterated the general position taken by it in *Gilow v. New York* ⁸³ and *Whitney v. California* ⁸⁴ that the right of free speech is not an absolute one, and that the state, in the exercise of its police power, may punish the abuse of this freedom. On this point Mr. Chief Justice Hughes said:

"There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions." ⁸⁵

As matters now stand, therefore, it would seem that the political and economic malcontent is guaranteed, in time of peace at any rate, a reasonably full opportunity to voice radical doctrines, provided there is no employment of, or incitation to, force, violence and crime.

Passing from the question of free speech to consideration of the problems arising out of attempted state action relating to such matters as the regulation of trade, commerce and banking, the regulation of forms and modes of judicial procedure, the conservation of wild game and natural resources, and the promotion of the public safety, convenience and general welfare, we come upon a varied assortment of cases.

⁸² *Supra* note 73, at 719, 51 Sup. Ct. at 632.

⁸³ *Supra* note 75.

⁸⁴ *Ibid.*

⁸⁵ *Supra* note 75, at 368-69, 51 Sup. Ct. at 535.

In *O'Gorman and Young, Inc. v. Hartford Fire Insurance Co.*⁸⁶ the Court refused to declare unconstitutional as a denial of due process of law a statute of New Jersey⁸⁷ which provided that "in order that rates . . . shall be reasonable", it should be unlawful for any fire insurance company licensed in the state to allow commissions in excess of a reasonable amount to persons acting as its agents, or to allow any commission to any person for acting as its local agent, in excess of that allowed to any one of its local agents on such risks in the state. The New Jersey court of errors and appeals had affirmed the judgment of the trial court sustaining the constitutionality of the statute upon the ground that since commissions paid to local agents naturally enter into the cost of such insurance to the public, it was within the police power of the state to require that the commissions must be reasonable.⁸⁸ Since 20 per cent. was the amount of commissions paid to some local agents, the effect of this legislation was to determine that a commission in excess of that amount was unreasonable. After observing that "the business of insurance is so far affected with a public interest that the State may regulate the rates", Mr. Justice Brandeis, who announced the Court's view, went on to say:

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."⁸⁹

Justices Van Devanter, McReynolds, Sutherland and Butler dissented on the ground that the law impaired the "liberty of contract" guaranteed by the Fourteenth Amendment. In a "separate opinion" they declared:

"In order to justify the denial of the right to make private contracts, some special circumstances sufficient to indicate the necessity therefor must be shown by the party relying upon the denial. Here the

⁸⁶ 282 U. S. 251, 51 Sup. Ct. 130 (1931), noted in (1931) 17 VA. L. REV. 490, (1931) 15 MINN. L. REV. 707, (1931) 31 COL. L. REV. 498, (1931) 44 HARV. L. REV. 643, (1931) 79 U. OF PA. L. REV. 806, (1931) 40 YALE L. J. 657. See also the discussion of this case in Powell, *State Utilities and the Supreme Court, 1922-1930* (1931) 29 MICH. L. REV. 811, at 816, 838.

⁸⁷ N. J. Laws 1928, c. 128, p. 258.

⁸⁸ 105 N. J. L. 642, 146 Atl. 370 (1929).

⁸⁹ *Supra* note 86, at 257-58, 51 Sup. Ct. at 132.

right freely to agree upon reasonable compensation has been abridged; and no special circumstances demanding such action have been disclosed. Under the construction placed upon the statute no agent can make an enforceable agreement with an insurance company definitely fixing his compensation. Always the company can defeat his claim for the agreed amount, reasonable in fact, by paying less to another agent."⁹⁰

The contrast between the *O'Gorman* and *Near* cases is significant. The statutes in both cases were contested on the ground that they violated the "liberty" guaranteed in the due process clause of the Fourteenth Amendment. In the *O'Gorman* case the "liberty" pertained to the right to contract. Mr. Justice Brandeis, after laying down the fundamental premise that "the business of insurance is so far affected with a public interest that the State may regulate the rates",⁹¹ and reminding us that "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute",⁹² reaches the conclusion that it "does not appear upon the face of the statute, or from any facts of which the Court must take judicial notice" that the legislative provision was not an "appropriate remedy" for the evils it was designed to eradicate.⁹³ In the *Near* case the "liberty" was that relating to speech and the press. Mr. Chief Justice Hughes, after conceding that such liberty was not "an absolute right" and that "the state may punish its abuse",⁹⁴ went on to observe that "the statute must be tested by its operation and effect",⁹⁵ and reached the conclusion that the statutory presumption in favor of its constitutionality must be overthrown.

Every justice who voted to hold the statute involved in the *Near* case invalid voted to sustain the constitutionality of the enactment in the *O'Gorman* case. The exponent of a realistic approach to the operation of the judicial process would seem to have ample ground for the view that the Court was influenced in drawing the lines where it drew them in the two cases much more by considerations of political, social and economic policy than by any recondite canons of constitutional interpretation. And the skeptic may perhaps be pardoned for suggesting that in the *O'Gorman* case Mr. Justice Brandeis utilized the illusory concept of "affectation with a public interest"⁹⁶ merely as a convenient device for justifying in esoteric

⁹⁰ *Supra* note 86, at 269, 51 Sup. Ct. at 136.

⁹¹ *Supra* note 86, at 257, 51 Sup. Ct. at 131.

⁹² *Supra* note 89.

⁹³ *Supra* note 86, at 258, 51 Sup. Ct. at 132.

⁹⁴ *Supra* note 73, at 708, 51 Sup. Ct. at 628.

⁹⁵ *Ibid.*

⁹⁶ *Supra* note 86, at 257, 51 Sup. Ct. at 131. In his dissenting opinion in *Tyson v. Banton*, 273 U. S. 418, 451, 47 Sup. Ct. 426, 435 (1927) Mr. Justice Stone said: "The phrase 'business affected with a public interest' seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression

legal theory a solution of a very practical problem in applied economics which the Court, by a majority of one, thought it wise to adopt. Realists who accept the Holmes theory of constitutional interpretation in due process cases will no doubt welcome the results arrived at by the Court in the two cases, even though they entertain mental reservations with respect to the sanctity of the formula made use of by Mr. Justice Brandeis in the *O'Gorman* case.

In *Abie State Bank v. Bryan*⁹⁷ the plaintiff bank had contested the constitutionality of a Nebraska statute⁹⁸ authorizing the levy of certain special assessments against state banks under the bank guaranty law of that state, upon the ground that their collection constituted the taking of its property without due process of law. The state district court had entered a decree in favor of the complainants sustaining their contention that the assessments were unreasonable and confiscatory, and hence repugnant to the Fourteenth Amendment. The decree, which gave a permanent injunction, was reversed by the Supreme Court of Nebraska; the injunction was dissolved and the action dismissed.⁹⁹ The plaintiff thereupon appealed to the Supreme Court of the United States. In delivering the Court's opinion sustaining the statute, Mr. Chief Justice Hughes pointed out that while the provisions of the original bank guaranty law providing for a fund to be raised by assessments upon all the state banks was an important safeguard for all depositors, it was nevertheless but a police regulation, the sanction of which lay in the constitutional power of the state and not in contract. The Court, moreover, considered of importance a subsequently enacted modifying statute¹⁰⁰ which provided that only three of the special assessments remained effective; and for the future there was a limitation of the obligation to a total annual assessment of two-tenths of one per cent. of average daily deposits instead of assessments aggregating six-tenths, as were made possible by the previous law. The future assessments, to this restricted amount, were limited to a period of ten years. The Chief Justice said:

"The origin of rights under the Bank Guaranty Law was wholly statutory—an act of grace by the Legislature, so far as depositors were

for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction."

⁹⁷ 282 U. S. 765, 51 Sup. Ct. 252 (1931), commented upon in (1931) 40 YALE L. J. 1101.

⁹⁸ NEB. COMP. STAT. (1922), § 8028, as amended by Neb. Laws 1923, c. 191, § 26.

⁹⁹ 119 Neb. 153, 227 N. W. 922 (1929).

¹⁰⁰ Neb. Laws 1930, Ex. Sess. c. 6; NEB. COMP. STAT. (1929), § 8-171, 8-172, 8-175, 8-176, 8-178, 8-179.

concerned, with the purpose of promoting the public welfare and with freedom in the Legislature to modify its regulation when the public welfare was deemed to require a change. We see no reason to doubt the power of the Legislature to extricate the banks and the administration of the guaranty fund from the serious plight in which they were found under the operation of the old plan and to exercise a reasonable discretion in seeking this result."¹⁰¹

That the statute challenged in this case was a reasonable regulation of the banking business, in the light of persistent bank failures and general economic depression, seems not to be open to serious doubt. It affords an interesting example, however, of a type of banking regulation enacted by state legislatures which eventually falls under the judicial scrutiny of the Supreme Court.

Federal statutes passed for the purpose of insuring safe transportation on interstate railroad trains have been numerous and varied.¹⁰² Except within the sphere covered by these acts, however, state lawmakers have continued to pass police regulations designed to promote the comfort and safety of passengers on these trains. Laws have been enacted for the purpose of eliminating grade crossings,¹⁰³ regulating speed,¹⁰⁴ setting forth precautions to be taken at highway crossings;¹⁰⁵ and an order of a state commission requiring the installation of interlocking devices at grade crossings with other railroads has been upheld.¹⁰⁶ State "full crew" laws regulating the number of employees required to be on duty on interstate trains represent a common form of safety regulation.¹⁰⁷ Such legislation has been passed

¹⁰¹ *Supra* note 97, at 783, 51 Sup. Ct. at 259.

¹⁰² Hours of Service Act, 34 STAT. 1415 (1907), 45 U. S. C. A. §§ 61-64 (1928); Safety Appliance Acts, 27 STAT. 531 (1893), 45 U. S. C. A. §§ 1-7 (1928); 32 STAT. 943 (1903), 45 U. S. C. A. §§ 8-10 (1928); 36 STAT. 298 (1910), 45 U. S. C. A. §§ 11-16 (1928); Ash Pan Act, 35 STAT. 476 (1908), 45 U. S. C. A. §§ 17-21 (1928); Boiler Inspection Act, 36 STAT. 913 (1911), 45 U. S. C. A. §§ 22-26, 28, 29, 31-34 (1928); as amended by act of March 4, 1915, 38 STAT. 1192, 45 U. S. C. A. 23, 30 (1928); July 1, 1916, 39 STAT. 262; June 12, 1917, 40 STAT. 105; June 26, 1918, 40 STAT. 616, 45 U. S. C. A. §§ 24-26 (1928); July 1, 1918, 40 STAT. 634; July 8, 1918, 40 STAT. 821; July 19, 1919, 41 STAT. 163; June 5, 1920, 41 STAT. 874; March 1, 1921, 41 STAT. 1156; March 4, 1921, 41 STAT. 1367; June 12, 1922, 42 STAT. 635; Feb. 13, 1923, 42 STAT. 1227; June 7, 1924, 43 STAT. 521, 43 STAT. 659, 45 U. S. C. A. §§ 22-27 (1928); Jan. 20, 1925, 43 STAT. 753; March 3, 1925, 43 STAT. 1198; April 22, 1926, 44 STAT. 305; Feb. 11, 1927, 44 STAT. 1069; May 16, 1928, 45 STAT. 573; by the Transportation Act of 1920 the Interstate Commerce Commission was given power to require the installation of automatic train stop devices on interstate railroads, see Interstate Commerce Act, 41 STAT. 456 (1920), 45 U. S. C. A. §§ 131-146 (1928).

¹⁰³ *Erie R. R. v. Board of Public Util. Comm'rs*, 254 U. S. 394, 41 Sup. Ct. 169 (1921); *Lehigh Valley R. R. v. Board of Pub. Util. Comm'rs*, 278 U. S. 24, 49 Sup. Ct. 69 (1928).

¹⁰⁴ *Galveston, Houston & San Antonio R. R. v. Wells*, 15 S. W. (2d) 46 (Tex. 1929); *Gillum v. Pacific Coast R. R.*, 152 Wash. 657, 279 Pac. 114 (1929). But cf. *Seaboard Air Line Ry. v. Blackwell*, 244 U. S. 310, 37 Sup. Ct. 640 (1917).

¹⁰⁵ *Nashville, Chattanooga & St. Louis R. R. v. White*, 278 U. S. 456, 49 Sup. Ct. 189 (1929); *Nashville, Chattanooga & St. Louis R. R. v. Morgan*, 160 Tenn. 316, 24 S. W. (2d) 898 (1929).

¹⁰⁶ *International & Great Northern R. R. v. Railroad Com. of Texas*, 275 U. S. 503, 48 Sup. Ct. 155 (1926), *aff'd* 296 S. W. 330 (Tex. 1926).

¹⁰⁷ See the footnote to the Court's opinion in *Missouri Pacific R. R. v. Norwood*, 283 U. S. 248, at 256, 51 Sup. Ct. 458, at 462 (1931). Thirteen states are listed as having such laws in addition to those of Arkansas, under consideration in this case.

upon favorably by the Supreme Court.¹⁰⁸ These decisions, however, were handed down prior to the Transportation Act of 1920, which greatly expanded the powers of the Interstate Commerce Commission. In *Missouri Pacific Railroad Co. v. Norwood*¹⁰⁹ the company sued the attorney general and the prosecuting attorneys of two circuits of Arkansas to enjoin the enforcement of statutes of that state regulating freight train crews and switching crews, claiming that they violated the equal protection, due process and commerce clauses of the Federal Constitution. The state laws in question had previously been upheld by the Supreme Court as against a similar claim of repugnancy to these clauses of the Constitution.¹¹⁰ It was contended that changes in railroad operating conditions since these Supreme Court decisions had made the laws unreasonable under the Fourteenth Amendment, and that the increased powers given to the Interstate Commerce Commission by the Transportation Act of 1920 had deprived the states of power to legislate in this field. From a decree of the federal district court for the western district of Arkansas dismissing the case on the ground that the complaint failed to show sufficient ground for relief,¹¹¹ an appeal was taken to the Supreme Court.

Answering the complainant's contention that the present operating conditions on its railroad in Arkansas and elsewhere, and on railroads generally in the country, differed in important particulars from those existing in 1907 and 1913, when these laws were passed, the Supreme Court, through Mr. Justice Butler, said:

"There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. It is not made to appear that the expense of complying with the state laws is now relatively more burdensome than formerly. Greater train loading tends to lessen operating expenses for brakemen. There is no statement as to present efficiency of switching crews compared with that when the 1913 Act was passed, but it reasonably may be inferred that larger cars and heavier loading of today make for a lower switching expense per car or ton. While cost of complying with state laws enacted to promote safety is an element properly to be taken into account in determining whether such laws are arbitrary and repugnant to the due process clause of the Four-

¹⁰⁸ *Chicago, Rock Island and Pacific R. R. v. Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275 (1911); *St. Louis, Iron Mountain & Southern R. R. v. Arkansas*, 240 U. S. 518, 36 Sup. 443 (1916).

¹⁰⁹ *Supra* note 107, noted in (1931) 31 COL. L. REV. 1040, (1931) 40 YALE L. J. 1101. See also on this subject (1931) 31 COL. L. REV. 450.

¹¹⁰ *Supra* note 108.

¹¹¹ 42 F. (2d) 765 (W. D. Ark. 1930).

teenth Amendment . . ., there is nothing alleged in that respect which is sufficient to distinguish this case from those in which we have upheld the laws in question."¹¹²

With respect to the commerce clause, it was said that the Transportation Act of 1920 had not changed the situation, since Congress had not empowered the Interstate Commerce Commission to fix the number of men to be employed in train or switching crews.¹¹³

The power of state legislatures to create boards or commissions for the purpose of exercising their power of regulation over railroads has been sustained in many decisions,¹¹⁴ subject, however, to the limitations that these commissions cannot be vested with strictly legislative¹¹⁵ or judicial powers¹¹⁶ and that their proceedings must be within the constitutional safeguards relating to due process of law and the equal protection of the laws,¹¹⁷ and that a state cannot authorize a railroad commission to regulate interstate commerce.¹¹⁸ Orders or regulations of state commissions, therefore, whether imposed by statute or ordinance, and though issued under the guise of the police power, must be "reasonable", not "arbitrary", and must bear some "reasonable" and "substantial" relation to the legislative enactments under which they are issued.¹¹⁹ The Supreme Court is, of course, the arbiter of the issue of the "reasonableness" of these administrative orders, and two cases involving such questions were decided during the 1930 term.

In *Chicago, St. Paul, Minneapolis and Omaha Railway Co. v. Holmberg*¹²⁰ the Court held that an order of the state railway commission of Nebraska requiring the railroad to construct an underground pass under a grade crossing on defendant's farm (which was divided approximately in half by the plaintiff's track) constituted a taking of property without due process of law. The railroad commission had acted in pursuance of a Nebraska

¹¹² *Supra* note 107, at 255, 51 Sup. Ct. at 461.

¹¹³ *Supra* note 107, at 256, 51 Sup. Ct. at 462.

¹¹⁴ See, for example, *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334 (1886); *New York & New England R. R. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437 (1894); *McNeill v. Southern Ry.*, 202 U. S. 543, 26 Sup. Ct. 722 (1906); *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047 (1894); *People v. Chicago, Indianapolis & Louisville Ry.*, 223 Ill. 581, 79 N. E. 144 (1906).

¹¹⁵ *Georgia R. R. v. Smith*, 70 Ga. 694 (1883); *State v. Great Northern Ry.*, 100 Minn. 445, 111 N. W. 289 (1907).

¹¹⁶ *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462 (1890).

¹¹⁷ *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, *supra* note 116; *Mercantile Trust Co. v. Texas and Pacific Ry.*, 51 Fed. 529 (1892).

¹¹⁸ *Houston & Texas Central Ry. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491 (1906); *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365 (1904); *Mobile & Ohio R. R. v. Sessions*, 28 Fed. 592 (1886).

¹¹⁹ *Chicago, Milwaukee & St. Paul Ry. v. Minneapolis*, 238 Fed. 384 (1916).

¹²⁰ 282 U. S. 162, 51 Sup. Ct. 56 (1930), noted in (1931) 19 GEO. L. REV. 381; discussed in Powell, *State Utilities and the Supreme Court, 1922-1930* (1931) 29 MICH. L. REV. 1001, at 1010.

statute¹²¹ which had delegated to it authority to order farm crossings underground if circumstances warranted. The supreme court of Nebraska had sustained the order.¹²² The Court spoke through Mr. Justice Stone as follows:

"It is plain that the commission proceeded upon the assumption that the statute authorized it to compel plaintiff to establish the underground pass for the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment."¹²³

In *Atchison, Topeka and Santa Fe Railway Co. v. Railway Commission of California*¹²⁴ the Supreme Court was asked to pass upon the validity of an order of the railroad commission of California requiring the construction by the appellant railway company of a union passenger station in the city of Los Angeles, together with incidental connections, extensions, improvements and terminal facilities, in substantial compliance with a plan outlined by the commission. This order, the Court held, was not only not in conflict with powers vested by Congress in the Interstate Commerce Commission, but was not a deprivation of the property of the railroads without due process of law or a denial to them of the equal protection of the laws. Mr. Justice McReynolds, however, dissented on the ground that the commission's order was "arbitrary, unreasonable, and beyond any power which the state is competent to confer".¹²⁵ In delivering the opinion of the Court, Mr. Chief Justice Hughes said:

"The principle that the state, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them, has frequently been applied. . . . The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. . . .

". . . The inadequacy of existing facilities has been shown and the relative merits of various plans have been the subject of elaborate study. The expense involved in the plan adopted, when considered in relation to the importance of the interests affected and to be served, does not appear to be so large as to warrant the condemnation of the plan as unreasonable and beyond the authority of the state."¹²⁶

¹²¹ NEB. COMP. STAT. (1922) § 5527, as amended by Neb. Laws 1923, c. 167.

¹²² 115 Neb. 727, 214 N. W. 746 (1927).

¹²³ *Supra* note 120, at 167, 51 Sup. Ct. at 57.

¹²⁴ 283 U. S. 380, 51 Sup. Ct. 553 (1931).

¹²⁵ *Ibid.* 397, 51 Sup. Ct. at 558.

¹²⁶ *Ibid.* 394-96, 51 Sup. Ct. at 557-58.

In *Railway Express Agency v. Virginia*¹²⁷ the Supreme Court held valid a provision of the constitution of Virginia¹²⁸ requiring a foreign corporation to take out a charter within the state in order to engage in intrastate express business. The appellant was a Delaware corporation given by its charter power to engage in international, interstate, and intrastate express business. Its right to do interstate business had not been questioned, but the supreme court of appeals of Virginia had affirmed¹²⁹ an order of the Virginia corporation commission refusing appellant's application to engage in intrastate business, unless it incorporated as a domestic corporation, on the ground that being a foreign corporation created since the constitution went into effect, it was prohibited by that instrument from doing intrastate business. Speaking for the Court, Mr. Justice Holmes declared that there was no substantial evidence that the requirement imposed a burden on interstate commerce and dismissed as "inaccurate" the objection based on the Fourteenth Amendment that the provision operated to deprive the appellant of its right to sue in the federal courts and to remove suits to them on the ground of diversity of citizenship. He said:

"The appellant is not deprived of any rights. It can do all that it ever could. If it sees fit to acquire a new personality under the laws of Virginia it cannot complain that the new person has not the same rights as itself."¹³⁰

It seems now to be settled that citizens of the United States, corporate or incorporate, have a constitutional right, in proper cases, to resort to the federal courts, and that any state law exacting from them a waiver of the exercise of their right as a condition to their being allowed to do business within the state, is void.¹³¹ In *Terral v. Burke Construction Co.* the reason for the rule was set forth by Mr. Chief Justice Taft as follows:

"The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."¹³²

¹²⁷ 282 U. S. 440, 51 Sup. Ct. 201 (1931), noted in (1931) 31 COL. L. REV. 497, (1931) 19 GEO. L. REV. 490, (1931) 44 HARV. L. REV. 1111, (1931) 40 YALE L. J. 1103, (1931) 79 U. OF PA. L. REV. 1141. See also Note (1931) 79 U. OF PA. L. REV. 1119.

¹²⁸ VA. CONST. (1902) § 163.

¹²⁹ 153 Va. 498, 150 S. E. 419 (1929).

¹³⁰ *Supra* note 127, at 444, 51 Sup. Ct. at 202.

¹³¹ *Terral v. Burke Const. Co.*, 257 U. S. 529, 42 Sup. Ct. 188 (1922).

¹³² *Ibid.* 532, 42 Sup. Ct. at 189.

In the instant Virginia case it may be argued that there was an attempt by the state, in requiring foreign corporations, as a condition to engaging in intrastate business to incorporate as domestic corporations, to accomplish indirectly what clearly it could not accomplish directly. The Supreme Court, however, as we have seen, specifically repudiated such an interpretation of Virginia's action. If the foreign corporation, acting upon the state's suggestion, becomes a domestic one, it cannot, says the Court, be heard to complain that it has lost any rights.¹³³ Against such a view it may be urged not only that it is at seeming variance with the doctrine of unconstitutional conditions but that it suffers from the vice of attaching too much significance to a legal fiction in disregard of economic realities.¹³⁴ On the other hand, there are cogent arguments in favor of preserving intact the state's power to exclude foreign corporations which need not be dwelt upon here. As Chief Judge Cardozo once said in another connection: "There are dangers in any choice."¹³⁵

In *Bain Peanut Co. v. Pinson*¹³⁶ the Court upheld a Texas statute¹³⁷ allowing suits against private corporations to be brought in any county in which the cause of action arose.¹³⁸ The legislation was contested upon the ground that it constituted a denial of the equal protection of the laws. In answer to this argument Mr. Justice Holmes said:

"The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints. In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than are fixed for private citizens we have to consider not a geometrical equation between a corporation and a man but whether the difference does injustice to the class generally, even though it bear hard in some particular case, which is not alleged or proved here."¹³⁹

The Court also pointed out that the reasonableness of the provision was made more probable by the fact that it had been adopted and sustained in several other states.¹⁴⁰

¹³³ *Supra* note 130.

¹³⁴ See HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918); BERLE, STUDIES IN THE LAW OF CORPORATION FINANCE (1928); Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879.

¹³⁵ *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

¹³⁶ 282 U. S. 499, 51 Sup. Ct. 228 (1931).

¹³⁷ TEX. REV. CIV. STAT. (1925) art. 1995, § 23.

¹³⁸ The legislation had previously been sustained by the court of civil appeals for the eleventh district of Texas. See 19 S. W. (2d) 203 (1929).

¹³⁹ *Supra* note 136, at 501, 51 Sup. Ct. at 229.

¹⁴⁰ The following cases were cited by the Court in support of this statement: *Grayburg Oil Co. v. Powell*, 118 Tex. 354, 15 S. W. (2d) 542 (1929); *Lewis v. South Pacific Coast R. R.*, 66 Cal. 209, 5 Pac. 79 (1884); *Cook v. W. S. Ray Mfg. Co.*, 159 Cal. 694, 115 Pac. 318 (1911); *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636 (1913); *Begley v. Mississippi Valley Trust Co.*, 252 S. W. 84 (Mo. Supp. 1923); *Merrimac Veneer Co. v. McCalip*, 129 Miss. 671, 92 So. 817 (1922).

In *Herron v. Southern Pacific Co.*¹⁴¹ the Supreme Court answered two questions certified to it by the circuit court of appeals for the ninth circuit arising out of an action brought in the federal district court of Arizona to recover damages for personal injuries resulting from a collision between the plaintiff's automobile and the defendant's train. In answer to the first it said that the state of Arizona might, without violating the due process clause of the United States Constitution, require by constitutional provision that the defense of contributory negligence or of assumption of risk should in all cases be left to the jury. In answer to the second, however, it said that where, in such an action, the evidence of contributory negligence or assumption of risk was conclusive and the question was one of law, the judge had the right and duty to direct a verdict for the defendant. It was pointed out that the controlling principle governing the decision was that state laws could not alter the essential character or functions of a federal court. "The function of the trial judge in a federal court", Mr. Chief Justice Hughes said, "is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'Rules of Decision' Act."¹⁴² The view accepted by the Court that the Arizona provision pertains to the *functions* of the trial judge in presiding over trials and is therefore not binding on federal courts is supported by legal precedents.¹⁴³ It is nevertheless open to the objection that in a very real sense the provision may be said to operate as a substantial modification of the substantive law, and therefore would seem to come within the scope of the "Rules of Decision Act."¹⁴⁴

The question of whether or not the concept of due process of law requires that a corporation sued on a judgment be permitted to set up, as a defense thereto, want of jurisdiction, on which ground it had unsuccessfully sought dismissal of the original action in which the judgment was rendered, was answered in the negative in *Baldwin v. Iowa Traveling Men's Association*.¹⁴⁵ Here the first suit was begun in a Missouri state court and removed to the federal district court for western Missouri, where judgment was rendered against the corporation. To the defense of want of jurisdiction set up by the respondent in a suit upon the judgment in the federal district court for southern Iowa, it was contended by the petitioner that such a

¹⁴¹ 283 U. S. 91, 51 Sup. Ct. 383 (1931), noted in (1931) 31 COL. L. REV. 1046, (1931) 26 ILL. L. REV. 322, (1931) 29 MICH. L. REV. 1080.

¹⁴² *Ibid.* at 94, 51 Sup. at 384.

¹⁴³ *Indianapolis & St. Louis R. R. v. Horst*, 93 U. S. 291 (1876); *McElsee v. Metropolitan Lumber Co.*, 69 Fed. 302 (C. C. A. 6th, 1895); *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387 (1894); *Mexican Central Ry. v. Glover*, 107 Fed. 356 (C. C. A. 5th, 1901); *Yates v. Whyel Coke Co.*, 221 Fed. 603 (C. C. A. 9th, 1915); *Vicksburg & Meridian R. R. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1 (1886); *Bowditch v. Boston*, 101 U. S. 16 (1879).

¹⁴⁴ This suggestion is made in (1931) 31 COL. L. REV. 1046.

¹⁴⁵ 283 U. S. 522, 51 Sup. Ct. 517 (1931).

defense constituted a collateral attack and a retrial of an issue settled in the first suit. The overruling of this objection and the resulting judgment for the respondent corporation were assigned as error.¹⁴⁶ The respondent, however, insisted that to deprive it of the defense which it made in the court below of lack of jurisdiction over it by the Missouri district court, would be a denial of the due process guaranteed by the Fourteenth Amendment. The Supreme Court reversed the judgment of the lower court. Mr. Justice Roberts, in announcing its opinion, said that there was involved in the due process doctrine no right to litigate the same question twice. He continued:

"The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. . . .

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."¹⁴⁷

In *Smith v. Cahoon*¹⁴⁸ the appellant, a private carrier for hire, was charged with operating vehicles upon the highways in Florida, without having obtained the certificate of public convenience and necessity and paying the tax required under the state statute.¹⁴⁹ The Act provided for the regulation, through the state railroad commission, of "auto transportation companies", which were defined to include all companies operating motor vehicles between fixed termini and over regular routes, with the exception of taxicabs and certain hotel busses and those exclusively engaged in transporting children to or from school or in carrying farm products and fish enroute to primary markets.¹⁵⁰ From the state supreme court's judgment¹⁵¹ reversing an order of the circuit court discharging the petitioner, an appeal was taken to the Supreme Court on the ground that the statute, as applied to appellant, was repugnant to the due process and equal protection clauses of the Fourteenth Amendment. In an opinion holding the statute invalid, Mr. Chief Justice Hughes said:

". . . we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the

¹⁴⁶ 40 F. (2d) 357 (C. C. A. 8th, 1930).

¹⁴⁷ *Supra* note 145, at 524-26, 51 Sup. Ct. at 517-18.

¹⁴⁸ 283 U. S. 553, 51 Sup. Ct. 582 (1931), noted in (1931) 31 Col. L. Rev. 1194.

¹⁴⁹ Fla. Laws 1929, c. 13700. Because of the taxation feature involved, this case might have been considered in the first section of this paper.

¹⁵⁰ *Ibid.* § 1 (h).

¹⁵¹ 99 Fla. 1174, 128 So. 632 (1930).

operation on its highways of carriers for hire, whether they are common carriers or private carriers. But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right."¹⁵²

The Court reacted differently to the contention raised in *Wampler v. Lecompte*¹⁵³ that a game law of Maryland¹⁵⁴ was invalid in that the state's power of classification had been exercised unreasonably. The statute provided that no duck blind might be placed at a greater distance from the shore than three hundred yards, and that blinds must be at least five hundred yards apart, but conferred a preferential right upon the riparian owner to select the position for a blind, providing he did not place it "within two hundred and fifty yards of the dividing line of any property owned by him and the adjoining property bordering on said waters . . . unless with the consent of the adjoining landowner". In sustaining this statute Mr. Justice Brandeis declared:

"The purpose of the legislation is, as the court found, 'the conservation of water fowl and the protection and safety of those engaged in shooting them. The necessity for such regulation is apparent, for, if blinds could be erected in broad waters at any distance from the shore without regard to the distance separating them, it would not only be conducive to the destruction and annihilation of ducks and other water fowl, but extremely dangerous to those shooting them.' . . . There was obviously no intention to discriminate in favor of persons having a large water frontage; for the consent provision enables owners of small frontages to join in erecting blinds spaced the requisite distance apart."¹⁵⁵

In the two cases last referred to, as in so many others considered in this paper, the problems of the "reasonableness" of the legislative classifications which the Court had to consider were of the type requiring for their solution the exercise of judicial discretion with respect to practical matters. It would seem that in *Smith v. Cahoon* the chief trouble was that sufficient data had not been marshalled in support of the reasonableness of the discrimination

¹⁵² *Supra* note 148, at 567, 51 Sup. Ct. at 587.

¹⁵³ 282 U. S. 172, 51 Sup. Ct. 92 (1930).

¹⁵⁴ MD. ANN. CODE (Supp. 1929) art. 99, §§ 40, 47; Md. Laws 1927, c. 568, §§ 39-46, as amended by Md. Laws 1929, c. 366, §§ 39-41.

¹⁵⁵ *Supra* note 153, at 174, 51 Sup. Ct. at 92-93.

complained of. That there may have been adequate justification for a classification of that sort is a not wholly untenable supposition. Mr. Justice Holmes might even have been expected to act upon such an assumption, in view of the language employed by him in *Missouri, Kansas and Texas Railway Co. v. May*,¹⁵⁶ where a Texas law permitting owners of land contiguous to railroads to sue the roads for penalties for allowing Johnson grass or Russian thistle to go to seed upon their rights of way, was challenged under the Fourteenth Amendment. In announcing the Court's opinion in that case, sustaining the constitutionality of the law, he said:

" . . . we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

In *Smith v. Cahoon*, however, Justice Holmes' imagination was not so active and he joined his colleagues in extending aid and comfort to Mr. Smith.

In *Wampler v. Lecompte*, as in *Smith v. Cahoon*, the state supreme court had upheld the constitutionality of the legislative classification.¹⁵⁷ In the *Wampler* case, however, the motives underlying the classification were obvious, or at any rate were made clear to the Court, since it declared that "no fact is shown on which to base the contention" that the power had been "exercised unreasonably". In *Smith v. Cahoon* the social justification, if any, for the legislative policy was beneath the surface, and the state's action was viewed as "wholly arbitrary".¹⁵⁸ It will be recalled that in *O'Gorman and Young, Inc. v. Hartford Fire Insurance Co.* Mr. Justice Brandeis declared that "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."¹⁵⁹ In borderline cases, however, unless the social and economic policy motivating the legislative classification is brought clearly

¹⁵⁶ 194 U. S. 267, 24 Sup. Ct. 638 (1904).

¹⁵⁷ 159 Md. 222, 150 Atl. 455 (1930).

¹⁵⁸ *Supra* note 148, at 567, 51 Sup. Ct. at 587.

¹⁵⁹ *Supra* note 86, at 257-58, 51 Sup. Ct. at 132.

into view and some justification of it attempted, it is by no means certain that the "presumption of constitutionality" will always be sufficient to prevent the legislation from receiving judicial disapprobation—and this in spite of the fact that the Court is probably now more "liberal" in its complexion than at any time within the last quarter of a century.

Conclusion

In the nine cases considered in the foregoing review in which the constitutionality of state action in the domain of taxation was challenged under the Fourteenth Amendment, three attempted exercises of such power were invalidated. In only *Coolidge v. Long*¹⁶⁰—the case which decided against the constitutionality of the Massachusetts inheritance tax law—was there sharp division among the justices. Here the vote was five to four, Chief Justice Hughes joining Justices Butler, Sutherland, Van Devanter and McReynolds in forming the majority against Justices Roberts, Holmes, Brandeis and Stone. The issues involved in *Beidler v. South Carolina Tax Commission*¹⁶¹ had in effect been settled during the preceding term of the Court in the cases of *Farmers Loan & Trust Co. v. Minnesota*¹⁶² and *Baldwin v. Missouri*,¹⁶³ in which the Court, expressly overruling *Blackstone v. Miller*¹⁶⁴ and inferentially repudiating several other cases, declared that the due process clause afforded protection against double taxation by the states. In the *Beidler* case, which held unconstitutional South Carolina's action in imposing an inheritance tax on indebtedness in the form of advances and dividends due from a South Carolina corporation to a non-resident stockholder, Justices Holmes and Brandeis bowed to the force of numbers "without repeating reasoning that did not prevail with the Court". Justice Holmes' vigorous dissent in *Baldwin v. Missouri* had already warned against the consequences of the "ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States". In the only other decision in which a state's attempt to exercise its taxing power was rendered nugatory—*Hans Rees' Sons, Inc., v. North Carolina*¹⁶⁵—there was no difference of opinion. In *State Board of Tax Commissioners of Indiana v. Jackson*¹⁶⁶—the decision sustaining the constitutionality of a state law imposing graduated license fees on the operators of chain stores—the division among the justices was five to four, Chief Justice Hughes and Justices Roberts, Holmes, Brandeis and Stone comprising the majority, against Justices Sutherland, Van Devanter, McReynolds and Butler.

¹⁶⁰ *Supra* note 46.

¹⁶¹ *Supra* note 43.

¹⁶² *Supra* note 30.

¹⁶³ *Supra* note 36.

¹⁶⁴ *Supra* note 32.

¹⁶⁵ *Supra* note 61.

¹⁶⁶ *Supra* note 10.

Of the remaining thirteen cases discussed in this paper in which some form of state action was attacked under the Fourteenth Amendment, in only four was the state's attempt to exercise its police power completely frustrated. In *Stromberg v. California*¹⁶⁷ Miss Stromberg's constitutional right to waive a red flag "as a sign, symbol or emblem of opposition to organized government", was affirmed as against state legislation which sought to deny it. Only Justices McReynolds and Butler were dissatisfied with this conclusion. But in *Near v. Minnesota*,¹⁶⁸ in which the Court was called upon to consider the effort of the lawmakers of that state to impose certain far-reaching restrictions upon the liberty of the press, the division was five to four. Chief Justice Hughes, speaking for his colleagues—Justices Holmes, Brandeis, Stone and Roberts—described the restraints imposed under the operation of the challenged statute as constituting the "essence of censorship". Justice Butler wrote a forceful dissenting opinion in which Justices Sutherland, Van Devanter and McReynolds concurred. That an order of the railway commission of Nebraska which required a railroad to construct an underground pass under a grade crossing on Mr. Holmberg's farm was an unconstitutional deprivation of the property of the railroad without due process of law, was decided, without any division of opinion, in *Chicago, St. Paul, Minneapolis and Omaha Railway Co. v. Holmberg*.¹⁶⁹ The reasonableness of the order of the railroad commission of California requiring the construction by the railways of a union passenger station in Los Angeles, however, was apparent to all members of the Court except Mr. Justice McReynolds, who thought that it was "arbitrary, unreasonable, and beyond any power which the state is competent to confer".¹⁷⁰ In *Smith v. Cahoon*¹⁷¹ the attempted regulation by Florida of so-called "auto transportation companies" which excepted taxicabs, certain hotel busses and those exclusively engaged in transporting children to or from school or in carrying farm products and fish enroute to primary markets, was considered by a unanimous Court to be repugnant to the due process and equal protection clauses. In *Herron v. Southern Pacific Co.*,¹⁷² the Court held that while the state of Arizona might constitutionally require that the defenses of contributory negligence and assumption of risk be left to the jury, a federal judge could nevertheless direct a verdict for the defendant when the evidence was conclusive and the question one of law. Chief Justice Hughes, speaking for the Court, said that the theory of the decision was that state laws could not alter the essential character or functions of a federal court. Sharp division of opinion marked the

¹⁶⁷ *Supra* note 78.

¹⁶⁸ *Supra* note 73.

¹⁶⁹ *Supra* note 120.

¹⁷⁰ *Atchison, Topeka & Santa Fe Ry. v. Railway Comm. of California*, *supra* note 124.

¹⁷¹ *Supra* note 148.

¹⁷² *Supra* note 141.

consideration by the Court of the New Jersey law attacked in *O'Gorman and Young, Inc. v. Hartford Fire Insurance Co.*¹⁷³ The regulation of the amounts of the commissions to be paid agents of fire insurance companies provided for in the statute received the approval of Chief Justice Hughes and of Justices Holmes, Brandeis, Stone and Roberts, but drew the judicial fire of Justices Van Devanter, McReynolds, Sutherland and Butler, who announced their views in a "separate opinion". In no other cases were dissenting opinions recorded.

The validity of Mr. Justice Holmes' famous *dictum* that "general propositions do not decide concrete cases" and that "the decision will depend on a judgment or intuition more subtle than any articulate major premise" ¹⁷⁴ is confirmed by study and analysis of the decisions of the Supreme Court of the United States in cases where federal and state action has been challenged under the Fifth and Fourteenth Amendments. The cases discussed in this paper constitute, of course, merely an exceedingly small portion of a constantly expanding fabric of "constitutional law" that is being fashioned into shape from year to year by the operation of the federal judicial process. The sharp cleavage among the justices along lines of social and economic policy is apparent, however, in a study even as limited in scope and treatment as the present. Because the issues in due process and equal protection cases involve at bottom problems of political and social control, it is extremely essential, in the forceful words of Professor Frankfurter, to "face the fact that five justices of the Supreme Court *are* molders of policy, rather than impersonal vehicles of revealed truth". ¹⁷⁵

The right of the Supreme Court to pass final judgment upon the reasonableness of legislative and administrative action, as illustrated in its review of rates, of classifications for purposes of taxation, and of other regulations designed to control public service corporations and industries said to be "affected with a public interest", is a power of tremendous and far-reaching import. It needs to be exercised by men whose training, experience and understanding in the broad field of the social sciences is as varied and comprehensive in scope as is their knowledge of legal precedents.

¹⁷³ *Supra* note 86.

¹⁷⁴ Dissent in *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905).

¹⁷⁵ *The Supreme Court and the Public* (1930) 83 FORUM MAGAZINE at 334.